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Journalists' Privilege: Overview of the Law and 109th Congress Legislation

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Summary

Journalists, the Supreme Court has written, claim "that to gather news it is often necessary to agree either not to identify the source of information published or to publish only part of the facts revealed, or both; that if the reporter is nevertheless forced to reveal these confidences to a grand jury the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment."¹ Though the Supreme Court concluded that the First Amendment does not provide a journalists' privilege, 49 states have adopted a journalists' privilege, and bills to adopt a journalists' privilege have been introduced in the 109th Congress, 1st session, in both the House and the Senate (S. 1419 and H.R. 3323). In addition, S. 2831 was introduced in the 109th Congress, 2d session.

The Supreme Court has written only one opinion on the subject of journalists' privilege: *Branzburg v. Hayes*, in which the Court decided three cases. After explaining the grounds on which journalists seek a privilege (quoted above), the Court noted that the reporters in the cases it was considering were seeking only a qualified privilege not to testify: "Although the newsmen in these cases do not claim an absolute privilege against official interrogation in all circumstances, they assert that the reporter should not be forced either to appear or to testify before a grand jury or at trial until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure."²

In *Branzburg v. Hayes*, however, the Court held that the First Amendment did not provide even a qualified privilege for journalists to refuse "to appear and testify before

¹ *Branzburg v. Hayes*, 408 U.S. 665, 679-680 (1972).

² *Id.* at 680.

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state or federal grand juries.”³ The only situation it mentioned in which the First Amendment would allow a reporter to refuse to testify was in the case of “grand jury investigations … instituted or conducted other than in good faith. … Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter’s relationship with his news sources would have no justification.”⁴

The reporters in all three of the cases decided in *Branzburg* had sought a privilege not to testify before grand juries. At one point in its opinion, however, the Court wrote that “reporters, like other citizens, [must] respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.”⁵ The reference to criminal trials should be considered dictum, and therefore not binding on lower courts.

Branzburg was a 5-4 decision, and, though Justice Powell was one of the five in the majority, he also wrote a concurring opinion in which he found that reporters have a qualified privilege to refuse to testify regarding criminal conduct:

Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.⁶

Powell’s opinion leaves it uncertain whether the First Amendment provides a qualified privilege for journalists to refuse to testify before grand juries.⁷ But “courts in almost every circuit around the country interpreted Justice Powell’s concurrence, along with parts of the Court’s opinion, to create a balancing test when faced with compulsory process for press testimony and documents outside the grand jury context.”⁸

Whether or not the First Amendment provides a journalists’ privilege, Congress and state legislatures may enact statutory privileges, and federal and state courts may adopt

³ *Id.* at 667.

⁴ *Id.* at 707-708.

⁵ *Id.* at 691.

⁶ *Id.* at 710.

⁷ Justice Stewart’s dissenting opinion in *Branzburg* referred to “Justice Powell’s enigmatic concurring opinion.” *Id.* at 725. Judge Tatel of the D.C. Circuit wrote, “Though providing the majority’s essential fifth vote, he [Powell] wrote separately to outline a ‘case-by-case’ approach that fits uncomfortably, to say the least, with the *Branzburg* majority’s categorical rejection of the reporters’ claims.” *In re: Grand Jury Subpoena*, 397 F.3d 964, 987 (D.C. Cir. 2005) (Tatel, J., concurring)(citation omitted), *rehearing en banc denied*, 405 F.3d 17 (D.C. Cir. 2005) (Tatel, J., concurring), *cert. denied*, 125 S. Ct. 2977 (2005).

⁸ Association of the Bar of the City of New York, *The Federal Common Law of Journalists’ Privilege: A Position Paper* (2005) at 4-5 [<http://www.abcnyc.org/pdf/report/White%20paper%20on%20reporters%20privilege.pdf>]

common-law privileges.⁹ Congress has not enacted a journalists' privilege, though bills that would do so have been introduced in the 109th Congress and are discussed below. Thirty-one states and the District of Columbia have enacted journalists' privilege statutes, which are often called "shield" laws.¹⁰

As for federal courts, Federal Rule of Evidence 501 provides that "the privilege of a witness ... shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."¹¹ The federal courts have not resolved whether the common law provides a journalists' privilege. The U.S. Court of Appeals for the District of Columbia, for one, "is not of one mind on the existence of a common law privilege [in federal court]. ... However, all [three judges on the panel for the case] believe that if there is any such privilege, it is not absolute and may be overcome by an appropriate showing."¹²

As for state courts, those in 18 states provide common law protection, making a total of 49 states plus the District of Columbia that have a journalists' privilege.¹³ Wyoming is the state without either a statutory or common-law privilege.

In 1980, the Department of Justice adopted a rule, which remains in effect without amendment, providing in part: "In determining whether to request issuance of a subpoena to a member of the news media, or for telephone toll records of any member of the news media, the approach in every case must be to strike the proper balance between the public's interest in effective law enforcement and the fair administration of justice."¹⁴

In re: Grand Jury Subpoena

In re: Grand Jury Subpoena is the federal court of appeals decision that declined to overturn the finding of civil contempt against journalists Judith Miller and Matthew Cooper for refusing to give evidence in response to subpoenas served by Special Counsel Patrick Fitzgerald in his investigation of the disclosure of the identity of a CIA agent.¹⁵

⁹ See *Branzburg*, *supra* note 1, 408 U.S. at 706.

¹⁰ These statutes are set forth in CRS Report RL32806, *Journalists' Privilege to Withhold Information in Judicial and Other Proceedings: State Shield Statutes*. Eighteen of these statutes existed at the time of *Branzburg*; 13 states and the District of Columbia have enacted them since 1972. Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 Yale Law and Policy Review 97, 110 (2002).

¹¹ Rule 501 also provides that, in civil actions and proceedings brought under state law, the privilege shall be determined in accordance with state law. The Federal Rules of Evidence are codified in title 28 of the U.S. Code.

¹² *In re: Grand Jury Subpoena*, *supra* note 7, at 972.

¹³ The figure of 18 appears in *In re: Grand Jury Subpoena*, *supra* note 7, at 994. Citations to 14 of these 18 appear in footnote 6 on page 18 of Association of the Bar, *supra* note 8.

¹⁴ 28 C.F.R. § 50.10.

¹⁵ *In re: Grand Jury Subpoena*, *supra* note 7.

After the Supreme Court declined to review the decision, Matthew Cooper agreed to testify, but Judith Miller continued to refuse and was imprisoned as a result.

The case was decided by a three-judge panel that issued an opinion for the court written by Judge Sentelle, with all three judges — Sentelle, Henderson, and Tatel — issuing separate concurring opinions. The court’s opinion, citing *Branzburg*, held that the First Amendment does not permit journalists to refuse to testify before a grand jury; and said (as quoted above) that the court was not of one mind on the existence of a common-law privilege but that, even if there is one, the special counsel had overcome it.

As for the three concurring opinions, Judge Sentelle expressed his view that there is no common-law privilege; Judge Henderson expressed her view that, in the interest of judicial restraint, the court should not “decide anything more today than that the Special Counsel’s evidentiary proffer overcomes any hurdle, however high, a federal common-law reporter’s privilege may erect”; and Judge Tatel addressed the issues of both the constitutional privilege and the common-law privilege.¹⁶

As for the constitutional privilege, Judge Tatel said that he was “uncertain,” in the light of Justice Powell’s “enigmatic concurring opinion” in *Branzburg*, that there is no “constitutional reporter privilege in the grand jury context.” Even if there is, however, he agreed that such a privilege would not benefit Miller or Cooper in the case before the court. As for the common-law privilege, Judge Tatel concluded that “‘reason and experience’ [quoting Federal Rule of Evidence 501] as evidenced by the laws of forty-nine states and the District of Columbia, as well as federal courts and the federal government, support recognition of a privilege for reporters’ confidential sources.” Judge Tatel found, however, that, in the present case, “the special counsel has established the need for Miller’s and Cooper’s testimony.”

Pending Journalist Shield Bills

On July 18, 2005, identical bills were introduced in the Senate and the House (S. 1419 and H.R. 3323), introduced by Senator Lugar and Representative Pence, respectively, but both with bipartisan support.¹⁷ On October 19, 2005, the Senate Committee on the Judiciary held a hearing on S. 1419. Previously, on July 20, 2005, the Committee held a hearing on “Reporters’ Shield Legislation: Issues and Implications.” Matthew Cooper, mentioned above in connection with *In re: Grand Jury Subpoena*,

¹⁶ Judge Tatel also wrote that, to conclude, as Judge Henderson had, “that the Special Counsel’s evidentiary proffer overcomes any hurdle, however high, a federal common-law reporter’s privilege may erect,” requires the adoption of a standard by which to determine when the privilege is overcome. But, to adopt a standard without first determining that a privilege exists would be, if a privilege does not exist, to “establish a precedent, potentially binding on future panels, regarding the scope of the assumed privilege, even though resolving that question was entirely unnecessary.” This would be “an undertaking hardly consistent with principles of judicial restraint.” *Id.* at 989-990.

¹⁷ S. 1419 is a revision of Sen. Lugar’s S. 340, 109th Cong., and H.R. 3323 is a revision of Rep. Pence’s H.R. 581, 109th Cong. The two earlier bills are identical to each other. Another journalists’ shield bill, S. 369, was introduced by Sen. Dodd, but Sen. Dodd later cosponsored S. 1419.

reportedly testified that, “[w]ithout whistle-blowers who feel they can come forward to the reporters with a degree of confidence, we might never have known the extent of the Watergate scandal or Enron’s deceptions or events that needed to be exposed.”¹⁸ The Department of Justice, however, opposed the legislation, with Deputy Attorney General James Comey stating in written testimony that “[t]he bill is bad public policy primarily because it would bar the government from obtaining information about media sources — even in the most urgent of circumstances affecting the public’s health or safety or national security.”

S. 1419/H.R. 3323 would establish a qualified privilege with respect to both the identity of a source and other information, but it would impose greater limitations on the ability to compel disclosure of the identity of a source than of other information. We will pose and answer questions about its salient features.

Where would the privilege apply? S. 1419/H.R. 3323 would apply in any “Federal entity,” which the bill defines to include the executive branch, the judicial branch, and administrative agencies, but not the legislative branch. The bill would not apply in state courts or other state entities.

What would be protected from disclosure? S. 1419/H.R. 3323 would protect (subject to qualifications discussed below) any testimony and any documents. Its privilege would not apply to “any testimony or document that consists only of commercial or financial information that is not related to news gathering or the dissemination of news and information by the covered person.”

Who could refuse to disclose? S. 1419/H.R. 3323 provides that a “covered person” — a person who may assert the privilege that the bill would create — is “an entity that disseminates information by print, broadcast, cable, satellite, mechanical, photographic, electronic, or other means and that — (i) publishes a newspaper, book, magazine, or other periodical in print or electronic form; (ii) operates a radio or television broadcast station . . . cable system, or satellite carrier, or . . . (iii) operates a news agency or wire service.” A “covered person” under the bill would also include “a parent, subsidiary, or affiliate of such an entity to the extent that such parent, subsidiary, or affiliate is engaged in news gathering or the dissemination of news and information; or . . . an employee, contractor, or other person who gathers, edits, photographs, records, prepares, or disseminates news or information for such an entity.”

The bill’s privilege would “apply to any testimony or document that a third party or a Federal entity seeks from a communications service provider if such testimony or document consists of any record, information, or other communication that relates to a business transaction between a communications service provider and a covered person.” A “communications service provider” would be defined as “any person that transmits information of the customer’s choosing by electronic means; and . . . includes a telecommunications carrier, an information service provider, an interactive computer service provider, and an information content provider (as such terms are defined in the sections 3 and 230 of the Communications Act of 1934 (47 U.S.C. 153, 230)).” In other

¹⁸ Eunice Moscoso, “Proposed media shield law draws fire,” *Atlanta Journal-Constitution* (July 21, 2005).

words, this provision would allow a covered person's telephone company or Internet service provider, for example, to assert a privilege not to disclose the covered person's phone or e-mail records.

The third party or Federal entity seeking to compel testimony or a document from a communications service provider would have to give notice to the covered person who is a party to the business transaction with the communications service provider, and the covered person would be entitled to be heard by the court before the testimony or disclosure is compelled.

The bill's requirement as to what an entity must publish or operate to be a covered person would limit the bill's coverage so that it apparently would not protect bloggers or others who post on the Internet, except those who write for Webzines (unless a blog were considered a magazine). It would apparently also not protect a freelance reporter who gathered information while having no contract with an entity to do so. If he subsequently sold the information to an entity, however, he might be viewed as a "contractor" or as a "person who gathers . . . news or information for such an entity"; this would depend upon how the quoted terms are construed.

S. 1419 apparently would also not protect people who gather news to disseminate solely on street corners, or who gather news that they attempt to publish solely in letters to the editor.

What exceptions would permit disclosure to be compelled? S. 1419/H.R. 3323's privilege would be qualified with respect both to the identity of a source and to other information, but it would impose additional limitations on compelling disclosure of the identity of a source. A federal entity would not be permitted to compel disclosure of any testimony or document — that would reveal sources or other information — unless a court determines by clear and convincing evidence that the entity "has unsuccessfully attempted to obtain such testimony or document from all persons from which such testimony or document could reasonably be obtained other than a covered person." In addition, "in a criminal investigation or prosecution based on information obtained from a person other than the covered person," the court would have to find, for disclosure to be compelled, that "there are reasonable grounds to believe that a crime occurred" and that "the testimony or document sought is essential to the investigation, prosecution, or defense. . . . [I]n a matter other than a criminal investigation or prosecution, based on information obtained from a person other than a covered person, the testimony or document sought [would have to be] essential to a dispositive issue of substantial importance to the matter."

To compel disclosure of the identity of a source or of information that could reasonably be expected to lead to the discovery of the identity of a source, the court would have to find, in addition to the above items, that disclosure is (1) "necessary to prevent imminent and actual harm to national security," (B) "would prevent such harm," and (C) "the harm sought to be redressed . . . outweighs the public interest in protecting the free flow of information."

Update: On May 18, 2006, Senator Lugar introduced a new journalists' privilege bill — S. 2831, 109th Congress. The Senate Committee on the Judiciary held hearings on it on September 20, 2006.